

**Before the
FEDERAL COMMUNICATIONS COMMISSION**

Washington, D.C. 20554

In the Matter of

Request for Review of Decision of the Universal Service Administrator

**San Benito Independent School District
("SBISD")**

CC Docket No. 02-6

File No. FRN881725 (FY2002)

REQUEST FOR EXPEDITED REVIEW

Bill Sugarek
Integrity Communications, Ltd.
P.O. Box 260154
11028 Leopard Street
Corpus Christi, TX 78426
Austin, TX 78758
(361) 242-1000

Cynthia B. Schultz
Paul C. Besozzi
Patton Boggs LLP
2550 M Street NW
Washington, DC 20037
(202) 457-6000

***Counsel to Integrity
Communications, Ltd.***
(Service Provider to SBISD)

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SUMMARY

This Request For Expedited Review involves USAC's wholly unwarranted summary imposition of an across-the-board freeze on the processing of all pending and future Funding Request Numbers ("FRN") associated with Integrity Communications, Ltd. ("Integrity" or "Company"). USAC seeks to justify the freeze based on a finding, in an examination conducted by KPMG LLP ("KPMG") of a single FRN of a customer of Integrity, the San Benito Independent School District ("SBISD"), that Integrity prematurely invoiced USAC for the approved work, which was successfully completed in accordance with the terms of Integrity's contract with SBISD.

Integrity was given no prior opportunity to respond to the KPMG examination finding or to respond to the unfounded and erroneous conclusions by USAC. The Company has responded to those allegations in substance, yet the freeze remains in effect, with USAC in control of when it might be removed. USAC also distributed the letter communicating the freeze to other customers of Integrity not involved in the KPMG examination, thereby jeopardizing Integrity's business relationships without any cause. Further, in the close knit educational community this information has spread to potentially affect Integrity's business relationships with other prospective customers.

Integrity respectfully submits that there has been no violation of any E-Rate Program rules, much less one that justifies this draconian penalty. The contract with SBISD permitted Integrity to submit progress invoices to SBISD, even though SBISD was not obligated to make progress payments. Moreover, under the E-Rate Program rules invoices to SBISD are required to enable Integrity to invoice USAC, although there is no requirement that the invoices to SBISD be paid before USAC is invoiced.

. There was no violation of the SBISD Request For Proposals, resulting contract or the E-Rate Program rules. USAC has cited to no authority and indeed has no authority under such circumstances to unilaterally suspend processing of all Integrity FRNs and freeze its Service Provider Identification Number ("SPIN"). Moreover, even if it did, at a minimum USAC must adhere to basic principles of due process before such a sweeping action. It afforded none in this case.

USAC has exceeded and abused its authority by a wide margin. The Federal Communications Commission must promptly act to prevent USAC from permanently damaging Integrity without any cause. Expedited action on this request is warranted given the scope of USAC's action, the lack of any authority for that action, the actual and potential impact on Integrity and its business, and the lack of any commitment on the part of USAC to promptly address the issue. It has been a month since Integrity filed a detailed response with USAC and Integrity has not even received an acknowledgment of its receipt.

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To: Chief, Wireline Competition Bureau

REQUEST FOR EXPEDITED REVIEW

Integrity Communications, Ltd. ("Integrity" or "Company"), acting through counsel and pursuant to Section 54.719(c) of the Federal Communication Commission's ("FCC" or "Commission") rules, submits this Request For Expedited Review ("Request" or "Appeal") seeking reversal of the October 24, 2007 decision of the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company's ("USAC" or "Administrator") to unilaterally suspend or refuse to take action on all pending and future Funding Request Numbers ("FRNs") associated with Integrity for support under the Schools and Libraries Support Mechanism ("E-Rate Program").¹ USAC based this across-the-board freeze of Integrity's Service Provider Identification Number ("SPIN") on assertions that a beneficiary audit of one of Integrity's customers for Funding Year ("FY") 2002 had "found that your entity or the school, school

¹ Unless otherwise indicated herein, the SLD and USAC are collectively referred to herein as "USAC."

district, or library was not in compliance with FCC rules because...[y]ou prematurely billed USAC for services or equipment.”²

I. THE REQUEST IS TIMELY FILED

The Request is timely filed. Section 54.720(b) of the Commission’s rules requires the filing of an appeal “within sixty (60) days of issuance” of a decision by USAC. The USAC Letter was dated on October 24, 2007, and sixty (60) days thereafter is December 23, 2007. The USAC Letter itself states that that any appeal to the FCC can be filed within sixty (60) days of the date of USAC’s written notification.³

However, because December 23 falls on a Sunday, a holiday under the Commission’s rules, and the Commission was closed for the Christmas holiday on December 24 and 25, the appeal period is extended to the next business day and must be filed no later than Wednesday, December 26, 2007.⁴ Therefore, the Request is timely filed with the Commission and the Commission must conduct a *de novo* review of USAC’s action.⁵

² Letter, dated October 24, 2007, from Schools and Libraries Division, Audit Response, Universal Service Administrative Company, to Mr. Stewart Burleigh, Integrity Communications (“USAC Letter”). Specifically, the USAC Letter stated that “USAC will take no action on pending or future...FRNs...associated with your entity until USAC determines that [Integrity] has reasonably complied with” certain remedial requests in the USAC Letter. The USAC Letter is attached as part of the Administrative Record (“AR”) hereto, which includes the relevant supporting documents. AR00082-84 (USAC Letter).

³ AR00084 (USAC Letter).

⁴ 47 C.F.R. § 1.4(j).

⁵ 47 C.F.R. § 54.723(a) (“The Wireline Competition Bureau shall conduct *de novo* review of request for review of decisions issue[d] by the Administrator.”) (emphasis in original).

II. STATEMENT OF INTEGRITY'S INTEREST IN THE REQUEST

Integrity has standing to file this appeal because Section 54.719(c) of the Commission's rules provides that, "[a]ny person aggrieved by an action taken by a division of the Administrator ... may seek review from the Federal Communications Commission."⁶ In this case, Integrity is directly aggrieved by USAC's unilateral decision to suspend or refuse to take action on all pending and future FRNs associated with Integrity for support under the E-Rate Program. Such an action clearly has a financial impact on Integrity. Moreover, USAC's distribution of the USAC Letter to Integrity's customers also poses a direct threat to the Company's existing and prospective business relations. Finally, even USAC recognized the appealable import of its drastic actions. The USAC Letter itself expressly confirms Integrity's right to lodge this Request.⁷

III. INTRODUCTION

This Request is the outgrowth of an egregiously arbitrary penalty imposed by USAC. Based on a single "finding" of a KPMG "compliance attestation examination" of approved E-Rate Program funding for the San Benito Independent School District ("SBISD" or "District"), one of Integrity's customers for FY2002, USAC, without giving Integrity any opportunity to respond, has shut down processing of all pending and future FRNs with which Integrity is associated. In doing so, USAC did not even identify the school district that was the subject of the examination or provide to Integrity any supporting information. Nor did USAC cite its authority, including any FCC rule or policy, to impose such a sweeping, across-the-board penalty on Integrity and its customers.

⁶ 47 C.F.R. § 54.719(c).

⁷ See Note 3, *supra*.

USAC's intent is to keep this unilateral freeze in effect until Integrity takes steps that USAC believes satisfy its unfounded concerns. Although Integrity responded directly and in detail to USAC on November 21, 2007, contesting the validity of KPMG's and USAC's conclusions,⁸ USAC's unilateral freeze remains in effect. Indeed, since then USAC has remained silent and, therefore, has left Integrity with no choice but to bring this most serious deprivation of due process to the Commission's attention.

IV. STATEMENT OF FACTS⁹

This appeal is unique to the extent that it does not deal with a USAC funding commitment decision, but rather a decision to freeze processing of all Integrity's FRNs based on funding committed and services successfully provided and paid for across all past, present, and future funding years. To provide the appropriate context for the Commission's consideration of USAC's actions, Integrity sets forth herein the complete background on the funding of the FRN at issue and provision of the services that has now precipitated the USAC processing moratorium against all present and future Integrity FRNs.

A. Interested and Affected Parties

The SBISD is a public school district offering progressive, innovative courses and programs to a student population of over 10,000. SBISD provides students with academic programs, a wide array of extracurricular activities and state-of-the-art technology. SBISD focuses on early childhood development and offers pre-K through 12th grade education classes.

⁸ Letter from Cynthia B. Schultz, Counsel to Integrity, to Brian Murphy, SLD, USAC, dated November 21, 2007 ("Response Letter"). AR00085-89 (Response Letter).

⁹ In addition to the AR, all of the facts set forth in the "Statement of Facts" section of this Request have been attested to, under penalty of perjury, by Integrity's Chief Executive Officer, Mr. Bill Sugarek, through a Declaration which is attached hereto. AR00090 (Declaration of Mr. Bill Sugarek).

Integrity provides eligible voice, data, and video services to the educational market as a service provider under the E-Rate Program administered by USAC. Integrity has received USAC-approved funding support under the E-Rate Program and participated as a service provider in that Program since the late 1990s.

B. Relevant FCC Form 470, RFP, Bid Review, and Service Provider Selection

On or about December 3, 2001, SBISD filed and posted FCC Form 470, Application No. 943910000389902, with USAC for FY2002. Shortly thereafter, it posted a Request for Competitive Sealed Proposals (“RFP”) on its website. Section III of the RFP stated that the RFP together with any addenda or modifications “comprise[d] the Contract Documents, and it [would]... include offered and negotiated proposal[s] as accepted by SBISD and the successful contractor.” Section XXVI of the RFP stated that “[n]o progress or advance payments [would] ... be made” and payment would be remitted at the end of the project after SBISD Superintendent approval and payment authorization had been received. The same Section also stated that “SBISD [would] ... do payments in accordance with the rules, regulations and policies of the E-Rate Program.” The RFP is silent regarding when Integrity may submit invoices to SBISD or USAC for payment.¹⁰

SBISD reviewed the bids it received in response to its RFP and selected Integrity as its Service Provider for its Internal Connections integrated voice and data project. On January 10, 2002, SBISD and Integrity entered into a legally binding agreement for the Internal Connections described in the RFP. The terms of the RFP were incorporated as the substance of the contract between the two parties (“Contract”).

¹⁰ AR00001-67 (RFP).

C. FCC Form 471, Receipt Acknowledgement Letter, Funding Commitment Decision Letter, and FCC Form 486

On January 15, 2002, SBISD filed its FY2002 FCC Form 471 application, Application No. 328020, with USAC identifying Integrity as its Service Provider for Internal Connections. On March 11, 2002, Integrity received a Receipt Acknowledgement Letter ("RAL") from USAC that stated Integrity was listed as the Service Provider for FRN881725, the Internal Connections project awarded to Integrity by SBISD. On April 7, 2003, Integrity received a positive Funding Commitment Decision Letter ("FCDL") from USAC notifying Integrity that funding had been approved for FRN881725 and set the Contract expiration date at June 30, 2003.

On December 16, 2003, SBISD filed FCC Form 486 with USAC notifying USAC of the service start date for FRN881725. On January 28, 2004, Integrity received a Form 486 Notification Letter notifying Integrity that the Form 486 had been processed by USAC for FRN881725. Integrity timely filed its FCC Form 473 for FY2002. The Form 486 Notification Letter also set December 16, 2003 as the service start date for FRN881725 and changed the Contract expiration date to September 30, 2004 since Internal Connections can be provided until September 30th following the close of the funding year on June 30, 2004. As requested, Integrity then began providing Internal Connections to SBISD pursuant to FRN881725.

D. Service Delivery Invoicing and Payment Under the Contract with SBISD

In order to invoice USAC for approved services on FCC Form 474, the E-Rate Program rules provide that (a) the relevant Form 486 must have been filed with and approved by USAC, (b) the related FCC Form 473 has been filed with USAC and (c) the service provider has invoiced the school district with a discounted bill for the services.

1. June 23, 2004 Progress Invoice from Integrity to SBISD and Service Provider Certification

As required by FCC Form 474, Integrity issued a discounted progress invoice to SBISD dated June 23, 2004 for services rendered through June 22, 2004, Invoice No. 2179, and filed FCC Form 474, Application No. 471719, with USAC on June 22, 2004. On or about June 24, 2004, SBISD also completed a Service Certification, Service Provider Invoice No. 881725-062204-2, certifying that the services described in the Integrity invoice submitted with FCC Form 474 “were delivered and installed.”

2. July 13, 2004 Service Delivery Extension Request

On or about July 13, 2004, SBISD filed a Service Delivery Extension Request with USAC for FRN881725, which Request was approved by USAC in a letter dated July 30, 2004, in conformance with E-Rate Program rules. The request was filed to provide SBISD and Integrity with additional time to complete the complex Internal Connections project approved for funding in FRN881725. The new date to deliver and install Internal Connections services was changed to September 30, 2005 by USAC at the request of SBISD.

3. August 5, 2004 FCC Form 500 Contract Extension Request

On or about August 5, 2004, SBISD filed FCC Form 500, Application No. SBISD-500-year-5-B, requesting an extension of its Contract expiration date for FRN881725 from September 30, 2004 to September 30, 2005, again in conformance with E-Rate Program rules. That request was granted on or about August 23, 2004 in a Form 500 Notification Letter received by Integrity from USAC.

4. Subsequent Progress Invoices from Integrity to SBISD and Related FCC Form 474 Invoices

Integrity sent additional progress invoices to SBISD for services provided pursuant to FRN881725, on or about January 1, 2005 (Invoice Nos. 2679 and 2677); August 4, 2005 (Invoice No. 3261); and August 10, 2005 (Invoice No. 3334), respectively. Integrity then filed FCC Form 474 invoices with USAC on or about January 3, 2005 (Application File Nos. 577806 and 527800); August 4, 2005 (Application File No. 575368); and August 10, 2005 (Application File No. 577622). For each FCC Form 474, SBISD completed a Service Certification stating that the services described in Integrity's invoice were delivered and installed. (Service Provider Invoice Nos. 881-010305-2, 881-010305-1, 881725-080405, and 881725-081005).

5. USAC's February 10, 2005 Payment to Integrity

USAC remitted payments to Integrity on February 10, 2005 (Application File No. 527806, \$89,556.25 and Application File No. 527800, \$93,895.00); September 16, 2005 (Application File No. 575368, \$133,500.00); and October 24, 2005 (Application File No. 577622, \$20,000.00) for the services that had been provided to SBISD.

6. September 30, 2005 Service Delivery Extension Request and Contract Extension Request

On or about September 30, 2005, SBISD filed a second Service Delivery Extension Request with USAC for FRN881725, which Request was approved by USAC in a letter dated December 13, 2005, again in conformance with E-Rate Program rules. The request was filed to provide SBISD and Integrity with additional time to configure, resolve, and troubleshoot issues related to the Internal Connections project. At the request of SBISD, USAC changed the date to deliver and install the approved Internal Connections services to September 30, 2006. SBISD filed a second FCC Form 500 requesting an extension of its Contract expiration date for

FRN881725 from September 30, 2005 to September 30, 2006, again in conformance with E-Rate Program rules. On or about January 30, 2006, SBISD's Form 500 was granted by the Form 500 Notification Letter received by Integrity from USAC.

7. Final Invoice from Integrity to SBISD

The final invoice for services (Invoice No. 4143) provided by Integrity to SBISD under FRN881725 was issued to SBISD on or about November 20, 2006. Pursuant to the RFP, after receiving SBISD Superintendent's approval for the Internal Connections project and payment authorization, full payment for the non-discounted portion of all services was received by Integrity from SBISD on December 4, 2006, less than thirty (30) days from the date the final invoice was issued.

8. Request for Payment from Integrity to USAC and Payment Received

A final FCC Form 474 invoice (Application No. 730651) was submitted to USAC by Integrity on or about January 26, 2007 and a Service Certification (Service Provider Invoice Nos. 881725-012607 and 881727-012607) was completed by SBISD that stated the services described in Integrity's invoice were delivered and installed. Payment was received from USAC by Integrity on or about February 8, 2007 (Application No. 730651, \$179,503.48).

E. KPMG LLP Examination of SBISD Universal Service Funds Received for FY2002 Under FRN881725

On or about November 29, 2006, SBISD received a letter from USAC informing SBISD that KPMG LLP ("KPMG") would be conducting a compliance audit on behalf of USAC for FY2002 disbursements received by SBISD for FRN881725.¹¹ The letter also included a two

¹¹ AR00068-72 (Letter from USAC to SBISD, dated Nov. 29, 2007 regarding compliance attestation examination to be performed by KPMG).

page list of documents to be gathered and questions to be answered and submitted to KPMG within two weeks of the date of the letter. A copy of the letter with attachments was never sent to Integrity by USAC. However, on or about December 11, 2006, SBISD faxed the letter and attachments to Integrity and asked for (a) assistance in responding to the technical network-related questions and (b) copies of the FCC Forms 474 submitted by Integrity to USAC for payment. Integrity provided the requested assistance to SBISD, including the documents. Integrity was not otherwise involved in the KPMG examination.

1. The KPMG Independent Accountants' Report

On or about January 19, 2007, KPMG, without ever consulting with Integrity, the provider of the services, issued its Independent Accountants' Report ("KPMG Report") of SBISD's compliance with the E-Rate Program rules in connection with FRN881725.¹² KPMG concluded that SBISD was in non-compliance with the E-Rate Program rules regarding the payment of the non-discounted share of Integrity's invoices. KPMG also concluded that in its opinion, SBISD's non-compliance meant that SBISD has not complied with the requirements related to the disbursement of \$316,951 for FRN881725 (Form 474 Invoice Nos. 577800, 527806 and 575368). KPMG and USAC did not provide a copy of the KPMG Report or any related materials supporting its conclusions to Integrity.

Finding No. 141681-2005-01 in the KPMG Report stated SBISD made a single payment of \$126,333 on December 4, 2006 to pay the entire non-discounted portion for services received under FRN881725. The KPMG Report noted that payment was made two weeks after the final invoice from Integrity, but none of the interim invoices issued by Integrity had been paid by

¹² AR00073-79 (Independent Accountant's Report from KPMG to SBISD, USAC and the Commission, dated Jan. 19, 2007).

SBISD. Rather, the final invoice payment by SBISD was the sum of all progress invoices previously issued by Integrity.

The KPMG Report determined that three of the five invoices were subject to their review and calculated that payment for those invoices was late ranging from 481 to 894 days. The Report further stated that the Service Certifications were completed by SBISD and it intended to pay its invoices on November 15, 2005. This date is based on one Service Certification (Service Provider Invoice No. 881725-080405). Two other Service Certifications (Service Provider Invoice Nos. 881-010305-1 and 881-010305-2) were signed rather than providing a date. At the time, the Contract expiration date was September 30, 2005. Under current E-Rate Program rules, an applicant has 90 days after completion of service to pay the non-discounted share, so a November 15 or 30, 2007 payment date, at the time, was a fair estimate of when payment would be made.

The last 2005 progress invoice (Invoice No. 3334) from Integrity to SBISD was dated August 10, 2005, well before SBISD filed a request to extend the implementation date for FRN881725 on September 30, 2005. That request was filed on the last day possible due to unforeseen circumstances related to equipment configuration problems and evacuations due to Hurricane Rita. Applying Section 54.523 of the FCC's rules¹³ and the FCC's *Fifth Report and Order*,¹⁴ the KMPG Report concluded that the total of \$316,951 disbursed for FRN881725 is recoverable.

¹³ 47 C.F.R. §54.523.

¹⁴ *In the Matter of Schools and Libraries Universal Service Support Mechanism, Fifth Report and Order*, 19 FCC Rcd 15808 (2004) ("Fifth Report and Order").

The KPMG Report did not recommend that USAC, as a result of the alleged non-compliance, take any action against Integrity. It also did not recommend the action of freezing the processing of all pending and future FRNs of Integrity. Nor did the KPMG Report make any legal determination about compliance by SBISD or Integrity regarding compliance with E-Rate Program rules.

2. The KPMG Beneficiary Finding Discussion Document and Responses

On March 1, 2007, KPMG prepared a Beneficiary Finding Discussion Document (“Discussion Document”) that contained essentially the same issues raised in the KPMG Report.¹⁵ KPMG discussed this document with SBISD on March 5, 2007 and SBISD was given a chance to respond. On March 7, 2007, SBISD responded to the KPMG Report and the Discussion Document and disagreed with KPMG’s findings.¹⁶ SBISD stated that it complied with the terms of the RFP and Texas law and it had reminded Integrity of the provisions of the RFP relating to progress payments. The District also stated that it timely paid the non-discount portion of services from FRN881725 at the completion of the project and there was no way for SBISD to know the FCC would change its rules regarding the payment of invoices three years after the RFP was posted. Again, KPMG neither provided nor discussed the Discussion Document with Integrity.

The Discussion Document did not recommend that USAC, as a result of the alleged non-compliance, take any action against Integrity or take the action of freezing the processing of all pending and future FRNs of Integrity. Nor did the Discussion Document make any legal

¹⁵ AR00080-81 (Beneficiary Finding Discussion Document from KPMG to USAC and SBISD, dated Mar. 1, 2007).

¹⁶ AR00078-79 (Discussion Document response from SBISD to KPMG, dated Mar. 7, 2007).

determination about compliance by SBISD or Integrity regarding compliance with E-Rate Program Rules.

F. October 24, 2007 Letter from USAC to Integrity Freezing Processing of All FRNs Associated with Integrity

Integrity heard nothing further about this matter until on or about October 24, 2007. Integrity received the USAC Letter stating that based on the result of an “audit”¹⁷ of a “school, school district or library that selected” Integrity as a service provider for FY2002, USAC would “take no action on pending or future ...FRNs...associated with” Integrity “until USAC determines that your entity has reasonably complied with the request explained below.”¹⁸ USAC also warned that it “may also heighten its scrutiny of any invoices submitted by” Integrity. USAC cited no FCC rule or other authority for imposing such a sweeping penalty.

USAC justified this action on the grounds that the audit of the unidentified “school, school district or library” found that “your entity or the school, school district, or library was not in compliance with FCC rules because...you prematurely billed USAC for services or equipment.” More specifically, the USAC Letter states that the audit “determined that you violated the terms and conditions of the RFP, which stated that there would be no advance or progress payments to the service provider before completion of the project,” but that Integrity had “billed the school district and USAC prior to completion of the project.” Finally, this non-compliance, according to the USAC Letter, “indicate[s] that you failed to comply with one or more of the certifications that you made on program forms and/or that your entity has otherwise

¹⁷ The USAC Letter uses the term “audit.” However, USAC’s Internal Audit Division initiated a “compliance attestation examination” according to KPMG. *See* AR00068. Neither USAC nor KPMG explain whether such an “examination” is different from an audit by USAC pursuant to the authority granted by the FCC. *See* 47 C.F.R. §54.516(c).

¹⁸ AR00082-84 (USAC Letter).

failed to comply with program requirements.” Again, the USAC Letter cited no FCC rule, decision or policy which had been violated by the progress invoices submitted by Integrity.

The USAC Letter provided that a predicate to removal of the across-the-board freeze of Integrity’s SPIN was Integrity’s demonstration to the satisfaction of USAC that the Company had in place “a plan to strengthen internal controls to ensure that when your entity submits an SPI Form, your entity has in fact provided, or is in the process of providing, the services and/or equipment to the school district, and your entity’s receipt of upfront payments and/or progress payments is included in the relevant contract between your entity and the school district.” USAC gave Integrity six (6) months to provide USAC with this proof, after which USAC would review the proof to determine if Integrity had “adequately addressed the audit finding(s) that resulted in the non-compliance.” Only thereafter, would USAC, if it was satisfied, “commence reviewing pending FCC Forms 471 containing FRNs associated with your entity.” If USAC was not satisfied, it will “deny pending FRNs associated with your entity.” Finally, the USAC Letter informed Integrity that it had the right to seek review of USAC’s determination to freeze funding to Integrity’s SPIN at the Commission.

The USAC Letter did not identify the particular school district or FRN involved. Integrity, after an independent and time consuming review, determined that it was SBISD and FRN881725. Integrity was not involved in the KPMG examination, except to provide certain information to SBISD, as noted above.

Nor did USAC provide Integrity with a copy of the examination findings. On or about October 25, 2007, Stewart Burleigh at Integrity contacted Brian Murphy at USAC to obtain a copy of the KPMG Report and supporting documentation.

Finally, in addition to sending the Letter to Integrity and SBISD, USAC, without any notice to Integrity, sent copies of the USAC Letter to five (5) other Texas school districts which are customers of Integrity. These school districts had nothing to do with the FRN or the KPMG examination in question.

G. Integrity Response to the USAC Letter

On November 21, 2007, Integrity submitted a substantive response to the allegations in the USAC Letter.¹⁹ Therein, in the hopes of demonstrating the substantive errors in USAC's analysis, Integrity, acting through counsel, outlined how and why Integrity and SBISD were in compliance with the E-Rate Program rules and why there was no basis for the imposition of a freeze of all pending and future Integrity FRNs. As of the date of this filing, Integrity has received no response and the unjustified and unwarranted freeze remains in effect.

V. ARGUMENT

USAC has acted arbitrarily and without authority in imposing an all-encompassing freeze on Integrity FRNs for an alleged E-Rate Program compliance question associated with the examination of a single recipient of the Company's services related to a single FRN. Moreover, USAC has done so without affording even the basics of due process to Integrity while spreading the word to other Integrity customers and, thereby, to the educational community at large that Integrity allegedly violated E-Rate Program rules. Integrity respectfully submits that such conduct is the height of the abuse of power by USAC.

As outlined below, Integrity and SBISD violated no E-Rate Program rules in connection with the invoicing of services which were satisfactorily delivered in accordance with the Contract. The unjustified and unsupportable action by USAC must be promptly reversed and the

¹⁹ AR00085-89 (Letter to USAC from Integrity, dated Nov. 21, 2007, responding to the USAC Letter).

freeze lifted. In view of the severe impact of such a freeze, the Commission must act expeditiously.

A. The KPMG Report and Document Discussion Made No Legal Determination of Non-Compliance Against Integrity

As a preliminary matter, Integrity notes that neither the KPMG Report nor the Discussion Document made any legal determination of non-compliance by Integrity. KPMG acknowledged that its “examination” did not “provide a legal determination on [SBISD’s] compliance with specific requirements.” Next, the KPMG Report made a “material finding of noncompliance of nonpayment” against SBISD, not against Integrity. Simply put, the KPMG Report and Discussion Document do not focus on Integrity and cannot be a basis for the USAC penalty. USAC improperly and unilaterally targeted Integrity without a basis in law or fact.

B. There Was No Violation of E-Rate Program Rules on Which to Base USAC’s Draconian Action

Integrity respectfully submits that USAC’s freeze action, based on the assertions that Integrity engaged in premature billing in violation of FCC rules, is founded on an erroneous interpretation of the Contract and FCC rules. As a result, USAC’s claims that such billing caused Integrity to fail to comply with certifications on FCC E-Rate Program forms are without legal foundation. Integrity respectfully submits that it completely complied with relevant state procurement laws and FCC rules.

1. There Was No Violation of the Terms and Conditions of the RFP

The USAC Letter asserts that the freeze is justified because “USAC’s audit”²⁰ determined that Integrity “violated the terms and conditions of the RFP, which stated that there would be no

²⁰ Presumably, USAC is referring to the KPMG examination. But as noted above, the KPMG Report and Discussion Document made no legal findings against Integrity.

progress payments [by SBISD] to the service provider before completion of the project...but you [Integrity] billed the school district and USAC prior to the completion of the project.” The plain fact is, however, that there were no such “payments to the service provider before the completion of the project.” As noted above, Integrity was not paid by SBISD until December 4, 2006, after all of the contemplated work was completed. So in this respect, there clearly was no violation of the RFP by the making of payments before they were called for by the Contract.

Nor did Integrity’s submission of the invoices to the SBISD constitute such a violation. The Contract does not prohibit, indeed it does not even address, the submission of progress invoices to SBISD or USAC as the work was being performed. Rather, the Contract only provided that the District was *not obligated to pay* any progress payments, but only pay the District’s share of the cost upon completion of all the work. SBISD reminded Integrity of that provision in response to the receipt of the interim invoices that Integrity submitted to the District. After the completion of the Contract, SBISD paid its share of the costs, in accordance with the terms of the Contract.

Thus, the USAC Letter is based on false premises, misapplication and misinterpretation of its own rules. It effectively seeks to rewrite the Contract to serve its own purposes. USAC ignores the distinction between what were in effect “progress invoices”, which were not barred in any way by the Contract, and “progress payments”, which the Contract made clear would not be (and were not) paid until the completion of the delivery of services.

USAC does not explain how, as a matter of Texas law, the mere submission of these invoices, without their payment, violated the terms and conditions of the Contract.²¹ Nor does

²¹ Under standard principles of construction, the failure to include progress invoices along with progress payments as prohibited under the Contract means that they are not included in the prohibition (*expressio*

USAC cite any authority, Texas or otherwise, that would support such a conclusion.²² SBISD did not seek to void the Contract because of these invoices; rather it reminded Integrity that the District was not obligated to pay them until the project was completed. Thus, to the extent that USAC's allegations of E-Rate Program rule violations are founded on this asserted violation of the Contract, they are totally without foundation and do not justify the all-encompassing freeze.

2. Neither the Submission of the Progress Invoices Nor the Form 474 Invoices Violate Any E-Rate Program Rules

Nor did Integrity's submission of the progress invoices to SBISD violate any E-Rate Program rules. Indeed, such progress invoices are permitted and required by the FCC's rules. The USAC Letter cites no rule holding to the contrary.

Integrity's submission of such invoices to the District was a prerequisite for Integrity to seek the approved E-Rate Program support from USAC for the SBISD project. Integrity was required to have submitted those invoices to the District; otherwise Integrity could not submit an FCC Form 474 to USAC.²³

Nothing in the Contract proscribed the submission of such FCC Forms for the work as it was performed. Indeed, under applicable E-Rate Program rules, once an FCC Form 486 notification is approved by USAC and an FCC Form 473 has been filed with USAC, Integrity

unius est exclusio alterius). See, e.g., *State v. Mauritz-Wells Co.*, 175 S.W.2d 238, 241 (Tex. 1943); *Harris County v. Dowlearn*, 489 S.W.2d 140, 146 (Tex. Civ. App. 1972, writ ref'd n.r.e.).

²² Again, KPMG concedes that it never made any "legal determination on....compliance with any specific requirements." And it certainly made no findings with respect to Integrity. Its "examination" was focused on the applicant, SBISD.

²³ See Instructions for Completing the Universal Service for Schools and Libraries Service Provider Invoice Form, FCC Form 474, April 2007, pp. 1 ("The service provider must have provided the service and given a discounted bill to the applicant prior to submitting the Form 474.") ("Form 474 Instructions"); *Id.*, p. 2.

was permitted to invoice USAC for discounted services that had been provided to SBISD.²⁴ Integrity commenced the submission of FCC Form 474 invoices to USAC only after these requirements had been met.

There is no obligation in the FCC's rules or decisions, or the instructions to FCC Form 474, that the District must have actually paid its non-discounted portion of the cost of the work prior to Integrity's submission of such invoices to USAC. The USAC Letter does not cite to such a requirement in the E-Rate Program rules. Neither KPMG nor USAC are authorized to create such a rule in order to justify a freeze of all Integrity FRNs.²⁵

Integrity certainly did not represent to USAC that it had been paid by the District when it did submit such FCC Form 474 invoices. In the case of each FCC Form 474, however, SBISD did submit the requisite Service Certification to USAC that the work described in the invoice had been delivered to the District and installed, which was, of course, the case. It is Integrity's understanding that all such Certifications were accurate and timely filed with USAC.

3. The Timing of Payment of the Non-Discounted Portion of the FRN Did Not Violate the E-Rate Program Rules

Furthermore, the work covered by the FRN was satisfactorily completed and invoiced within the period expressly permitted by USAC. Again, SBISD paid its share within the time permitted under the FCC's rules that were applicable to the Contract. The Commission's current rule, which provides that a beneficiary's failure to pay its non-discounted share within ninety (90) days after delivery of service is presumed to be non-compliant with the requirement to pay

²⁴ *Id.*

²⁵ 47 C.F.R. §54.702(c). Clearly, if USAC is directly proscribed from doing so, one of its auditors has no greater authority.

that share, was adopted prospectively in August of 2004, long after the Contract had been executed.²⁶

Nevertheless, even with respect to the facts herein, SBISD complied with this presumption by making its final payment well within the 90-day period. As noted above, SBISD made payment to Integrity within fourteen (14) days after the final progress invoice was submitted. So this final payment was clearly within the ninety (90) day timeline. It was also consistent with the requirements of Texas law applicable to the Contract.²⁷

Based on the foregoing, Integrity complied with the requirements of the Contract and the applicable FCC rules and there is, therefore, absolutely no basis for requiring Integrity to put in place any plan as requested by the USAC Letter. USAC is demanding that Integrity develop a plan to comply with requirements²⁸ that, as outlined above, are not grounded on statutes, rules or precedent governing the E-Rate Program, particularly those which relate to invoicing for approved support.²⁹ USAC has no authority unilaterally to develop or apply its own rules as a

²⁶ *Fifth Report and Order*, ¶24 (“We clarify *prospectively* that a failure to pay more than 90 days after completion of service....”) (emphasis supplied).

²⁷ See Texas Government Code §2251.021.

²⁸ Moreover, USAC’s request for “a plan” to comply with requirements is vague and non-instructive. USAC does not provide any guidance or policy rule on its web site to support this action. The FCC has not set any policy guidelines that are instructive to the applicant or to the service provider as to the requirement, definition or content of such a “plan” in either its regulations or its orders. USAC’s “plan” requirement along with USAC’s freeze rises to the level of rule-making. Congress authorized the FCC, not USAC, to “establish competitively neutral rules to enhance ... access to advanced telecommunications and information services for all public and nonprofit” schools and libraries. 47 U.S.C. § 254(h)(2). To the extent that USAC has frozen Integrity’s SPIN, its actions are no longer competitively neutral, in that they interfere with state contract law and business relations between Integrity and all of its other customers for which no rule violation has been identified by USAC. It is unlawful under these circumstances for USAC to halt the processing of funding for these other schools.

²⁹ With the exception of a few instances not applicable to this Request, USAC’s invoicing procedures have never been approved, adopted or codified by the Commission.

basis for the actions against Integrity reflected in the USAC Letter. That is not USAC's role and the Commission's rules expressly prohibit such USAC rulemaking.

C. USAC Acted Without Authority in Imposing the Blanket Freeze

USAC's authority in processing E-Rate Program applications is not unlimited. USAC cannot fashion policies and remedies at will, in the general guise of seeking to protect against waste, fraud and abuse. The FCC's rules expressly state that "[t]he Administrator may not make policy, interpret unclear provisions of statute or rules, or interpret the intent of Congress."³⁰ It is for the Commission to determine the extent of USAC's authority under the Communications Act of 1934, as amended (the "Act"), and the Commission's rules.³¹

Integrity respectfully submits that there is no provision in the Act or the FCC's rules which under any reasonable interpretation would permit USAC unilaterally to suspend the processing of all pending and future Integrity FRNs under the circumstances presented here.³² USAC has acted beyond its authority and it is the Commission's responsibility promptly to reverse this administrative excess.

The USAC Letter makes general reference to protecting against waste, fraud and abuse, but there is absolutely no evidence of any such activity here or any failure to adhere to the core E-Rate Program requirements. The services were timely provided in accordance with the

³⁰ 47 C.F.R. §54.702(c).

³¹ *Id.* ("Where the Act or the Commission's rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission.").

³² Indeed, this across-the-board suspension is even harsher than USAC's announced policy regarding "Principles for Treating Entities Under Investigation" that allows for further processing of FRNs unrelated to the entity under law enforcement investigation. See <http://www.usac.org/sl/tools/reference/principles-for-treating-entities.aspx>. Here, there is no law enforcement investigation which has precipitated USAC's draconian action; rather, this is a simple case of the KPMG and USAC misreading the RFP and misapplying the rules.

Contract and the authorizations provided by USAC. There is no evidence or suggestion that the funds were improperly used. To imply that such concerns, without any evidence to support them, justify the across-the-board freeze imposed is wholly improper and abusive.

D. USAC Must Be Required to Provide Service Providers with Basic Due Process

Even assuming *arguendo* that USAC had a colorable basis for claiming that (a) an E-Rate Program rule violation might have occurred and (b) USAC had authority to suspend processing of all Integrity FRNs as a result, the Commission should never permit the imposition of such a heavy penalty without affording the basics of due process to Integrity. In this case, USAC provided none.

USAC acted unilaterally without permitting Integrity to provide any prior response or explanation. At the same time, USAC provided little supporting information about the specific non-compliance; no specific FRN or school district is even mentioned in the USAC Letter. Rather, USAC left it to Integrity to determine, through an independent and time consuming review, that USAC's allegations related to FRN881725 for eligible Internal Connections approved for FY2002 E-Rate Program support and provided by Integrity to SBISD.

Further, USAC provided no copy of the KPMG Report or Discussion Paper to Integrity in conjunction with the USAC Letter. Integrity was left to try to obtain that fundamentally important information *only after* the blanket suspension already had been imposed.

Not only did USAC refuse to give Integrity any prior notice or opportunity to respond, USAC distributed the USAC Letter to other Integrity customers that had nothing to do with the examination or the circumstances described therein. As might be expected in a close knit educational community, Integrity understands that this distribution by USAC has only facilitated

further spreading of USAC's improper assertions about Integrity to its own customers and other potential customers, clearly posing a threat to Integrity's existing and prospective business relations, again based on a single examination to which Integrity was not a party.

USAC took this action without providing or citing any authority for the claims of E-Rate Program rule violations as a result of the invoicing process. Nor did USAC reveal the statutory or regulatory basis for its authority to impose an across-the-board freeze on Integrity FRNs as a result of a single review, with which Integrity was not even involved. Such action was not even a recommendation of the KPMG Report or the Discussion Paper. Nor was it a recommendation of USAC's own Internal Audit Division.

Finally, USAC gave no indication of when it might remove such a freeze, even if Integrity responded to the USAC Letter, which it did on November 21, 2007. USAC could leave Integrity in limbo and hold hostage all of its FRNs for as long as USAC might desire, with no accountability. This action is unfair, discriminatory, and prejudicial to Integrity and to all of the applicants that have pending and future E-Rate Program FRNs with Integrity. In the end, it is the children that are left behind.

Such treatment by USAC violates the basic and fundamental tenets of due process required by federal programs, agencies, courts and state and federal audit agencies, as embodied in the Administrative Procedures Act and relevant decisions thereunder.³³ Moreover, it is inconsistent with the Commission's intent as to how USAC is to exercise its audit authority with

³³ 5 U.S.C §552 *et seq.*

respect to beneficiaries.³⁴ Service providers should not be subjected to any lesser standard, particularly in connection with the sweeping suspension that USAC has imposed.

The Commission has previously warned USAC about summarily denying funding without providing any opportunity to respond to compliance issues.³⁵ Yet here, USAC has constructively denied not only pending, but future FRNs, until some unspecified date when and if it is satisfied that Integrity has resolved what has been demonstrated herein to be a non-existent compliance issue. This is wholly inconsistent with the spirit of those Commission instructions.

USAC cannot and must not be held accountable to some lesser, unspecified or non-existent due process standard. The freeze on all Integrity FRNs must be removed.

VI. EXPEDITED COMMISSION ACTION IS CLEARLY WARRANTED

Expedited Commission action on this Request is clearly justified. USAC's action is sweeping in scope. It has clearly affected its business relationships with existing customers and has the potential to damage permanently the Company's position in the E-Rate Program community. USAC has set no timeline for acting to remove the freeze; Integrity responded to the USAC Letter over a month ago and USAC has remained silent. Failure of the Commission to take immediate action³⁶ will likely mean irreparable harm to Integrity, based on, as noted an

³⁴ See *Fifth Report and Order*, ¶75, n. 133 (USAC auditing standards should include opportunity for an audited beneficiary to provide comments on a draft report before it is finalized.).

³⁵ See e.g., *In re Requests for Review of Decisions of the Universal Service Administrator by Academy of Excellence*, Order, 22 FCC Rcd 8722 (2007) (explanation and opportunity to address questions regarding applicant resources); *Requests for Review of Decisions of the Universal Service Administrator by Bootheel Consortium*, Order, 22 FCC Rcd 8747 (2007) (explanation and opportunity to address questions regarding eligible entities); and *In re Requests for Review of the Decision of the Universal Service Administrator – Academia Claret, Puerto Rico, et al*, Order, 21 FCC Rcd 10703 (2006) (explanation and opportunity to respond to alleged defects in applicant conducted surveys).

³⁶ General Accountability Office, GAO-05-151, February 2005, "Greater Involvement Needed by FCC in the Management and Oversight of the E-Rate Program," p. 8 (FCC retains the responsibility for

explained above, what Integrity respectfully submits are wholly specious and erroneous claims of E-Rate Program violations.³⁷ Where there has been a potential material impact of this sort, the Commission has been willing to act in expeditious fashion³⁸; it must do so here. Indeed, Integrity has satisfied all of the criteria for the Commission to stay the effect of USAC's action, while it considers this request.³⁹

VII. CONCLUSION AND REQUEST FOR RELIEF

Integrity respectfully requests the Commission to stay the affect of USAC's freeze of Integrity's SPIN as it considers this request, expeditiously grant this appeal and instruct USAC to resume processing pending and future FRNs associated with Integrity. For the reasons set forth above, Integrity requests the Commission to make a finding that the USAC has improperly stopped processing FRNs associated with Integrity and incorrectly interpreted Texas state law and Commission rules in denying E-Rate Program funding to Integrity's customers. Further, Integrity respectfully requests the Commission instruct USAC to restore processing of pending

overseeing the program's operations and ensuring compliance with the commission's rules.") ("*GAO Report*").

³⁷ The facts of this case are such that action in 90 days, which is the period within which, under the Commission's rules, appeals are normally to be decided, is wholly insufficient. 47 C.F.R. §54.724. Unfortunately, even ninety (90) days has been the exception, rather than the rule, in the case of Commission actions on appeals of even a routine nature. *See generally GAO Report*.

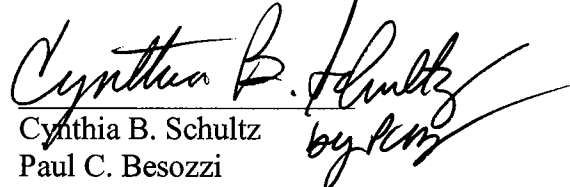
³⁸ *See In the Matter of Hyperion Long Haul, L.P.*, 15 FCC Rcd 10202, 10204 (Wireless Telecomm. Bureau 2000).

³⁹ *See, e.g., Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) ((1) a likelihood of success on the merits, (2) the threat of irreparable harm absent the grant of preliminary relief, (3) the degree of injury to other parties if relief is granted, (4) that a stay will be in the public interest)). The Commission balances these factors on a case-by-case basis and a request for stay may be granted on account of a particularly strong showing as to at least one of the factors, regardless of an absence of showing of another factor. *See AT&T v. Ameritech*, 13 FCC Rcd 14508, 14516, ¶14 n.43 (1998).

FRN's associated with Integrity no later than two (2) days from the release date of the Commission's order granting this appeal.

Bill Sugarek
Integrity Communications, Ltd.
P.O. Box 260154
11028 Leopard Street
Corpus Christi, TX 78426
Austin, TX 78758
(361) 242-1000

Respectfully submitted,


Cynthia B. Schultz
Paul C. Besozzi

Patton Boggs LLP
2550 M Street, NW
Washington, DC 20037
(202) 457-6000

Counsel to Integrity Communications, Ltd.
(Service Provider to SBISD)

December 26, 2007

CERTIFICATE OF SERVICE

I, Carly T. Didden, certify on this 26th day of December, 2007, a copy of the foregoing Request for Review has been served via electronic mail or first class mail, postage pre-paid, to the following:

Michelle Carey
Senior Legal Advisor to Chairman Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Michelle.Carey@fcc.gov

Randy Clarke
Legal Counsel to the Bureau Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Randy.Clarke@fcc.gov

Gina Spade
Assistant Division Chief
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Gina.Spade@fcc.gov

Dana R. Shaffer
Bureau Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Dana.Shaffer@fcc.gov

Jeremy Marcus
Division Chief
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Jeremy.Marcus@fcc.gov

Letter of Appeal
Schools and Libraries Division-
Correspondence Unit
100 S. Jefferson Road
P.O. Box 902
Whippany, NJ 07981



Carly T. Didden